Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JOSEFA ROSARIO

Petitioner,

v.

ERIC H. HOLDER, JR., UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

The First Question Presented is:

1. Should the definitions of "battery" and "extreme cruelty" within 8 C.F.R. § 204.2(c)(1)(vi) be interpreted to reflect a professional understanding of domestic violence for the purpose of decisions regarding eligibility for Special Rule Cancellation under INA § 1229b(b)(2)?

The Second Question Presented is:

2. If the professional understanding of domestic violence is reflected in the definitions of these terms, are decisions regarding eligibility for Special Rule Cancellation factual, non-discretionary and therefore reviewable by courts of appeals?

List of Parties and Rule 29.6 Statement

The petitioner is Josefa Rosario. The respondent is Eric H. Holder, Jr., the Attorney General of the United States. There are no corporate parties.

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PETITION FOR WRIT OF CERTIORARI

Josefa Rosario respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The decision of the court of appeals is reported at 627 F.3d 58 and is reproduced in the Appendix at 27a. The decisions of the Board of Immigration Appeals and the immigration judge are unpublished and are reproduced in the Appendix at 41a and 47a, respectively.

Statement of Jurisdiction

The judgment sought to be reviewed was entered by the Court of Appeals for the Second Circuit on December 6, 2010. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254.

Statutory Provisions and Regulation Involved

The statutes involved are 8 U.S.C. § 1229b(b)(2) and 8 U.S.C. § 1252(a)(2). The regulation involved is 8 C.F.R. § 204.2(c)(1)(vi).

8 U.S.C. § 1229b(b)(2) states:

(A) Authority

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who

is admissible or deportable from the United States if the alien demonstrates that –

(i)

(I) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen . . .

(II) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a lawful permanent resident . . .

* * *

(ii) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application . . .

(iii) the alien has been a person of good moral character during such period . . .

(iv) the alien is not inadmissible under paragraph (2) or (3) of section 1182(a) of this title, is not deportable under paragraphs (1)(G) or (2) through (4) of section 1227(a) of this title, subject to paragraph (5), and has not been convicted of an aggravated felony; and

(v) the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

* * *

(D) Credible evidence considered

In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

8 C.F.R. § 204.2(c)(1)(vi) states:

(vi) Battery or extreme cruelty. For the purpose of this chapter, the phrase "was battered by or was the subject of extreme cruelty" includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence. The qualifying abuse must have been committed by the citizen or lawful permanent resident spouse . . . .

8 U.S.C. § 1252(a)(2) states:

(B) Notwithstanding any other provision of law (statutory or non-statutory) . . . no court shall have jurisdiction to review –

(i) any judgment regarding the granting of relief under section . . . 1229b . . . or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security . . . .

(D) Nothing in subparagraph (B) or (C) . . . which limits or eliminates judicial review[] shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

Statement of the Case

This case presents two fundamental questions of statutory interpretation that have divided the circuits: whether the definition of "battery" and "extreme cruelty" within 8 C.F.R. § 204.2(c)(1)(vi) should be interpreted to reflect a clinical understanding of domestic violence for the purpose of decisions regarding eligibility for Special Rule Cancellation under INA § 1229b(b)(2), and whether doing so results in factual, non-discretionary eligibility decisions under that Rule. This section of the INA is sometimes referred to as "VAWA relief" or "VAWA cancellation," since the provision was added to the INA as part of the Violence Against Women Act ("VAWA"). *See Sanchez v. Keisler*, 505 F.3d 641 (7th Cir. 2007). As a result, any definition of "batter"

or "extreme cruelty" applied to this statute should honor the public policy behind VAWA.

The Petitioner, Josefa Rosario, is a 54-year-old native and citizen of the Dominican Republic. Ms. Rosario was admitted to the United States on or about February 7, 1994 in Miami, Florida on a Visitor's Visa. In 1995, Ms. Rosario met Jose Martinez through a mutual friend. (Certified Appellate Record 121 ("CAR")). Mr. Martinez is a citizen of the United States, born November 2, 1972 in Puerto Rico. Ms. Rosario and Mr. Martinez lived together and then married on December 2, 1996. (Id.) However, after seven months of marriage Mr. Martinez's attitude changed, and he grew more aggressive and offensive. (CAR 122). Mr. Martinez weighed almost twice Ms. Rosario's weight, (id.), and he was eight years her minor. (CAR 145).On four or five separate occasions over the course of three months, Mr. Martinez shook Ms. Rosario and threw her aside. (CAR 122-124). At times, he pressed and shook her with such force that her body would hurt badly. (CAR 123). Mr. Martinez also often demanded money from Ms. Rosario, which he claimed was for cigarettes, and she would give him the money - twenty or thirty dollars at a time – out of fear that he would hit her if she refused. (CAR 125, 145). "I didn't give it to him spontaneously. I gave it to him because I was afraid of him and because I wanted to get rid of him because he would tell me, 'I'm going to . . . hurt you if you don't give it to me.'" (CAR 125). Mr. Martinez had filed paperwork on behalf of Ms. Rosario for her green card, and he often threatened her, saying that she was "in [his] hands." (Id.)

On August 30, 2002, Ms. Rosario was issued a Notice to Appear, thereby placing her into Removal Proceedings before an Immigration Judge in Hartford, Connecticut. Ms. Rosario filed for relief under Special Rule Cancellation of Removal, section 240(A)(b)(2) of the Immigration and Nationality Act ("INA"), as a battered spouse who has been subjected to extreme cruelty by her United States citizen husband.

On January 5, 2005, Ms. Rosario appeared before the Immigration Judge, at which time prior counsel admitted that the application for special rule Cancellation of Removal had not been timely filed. (CAR 40). A Motion to Reconsider was subsequently filed and granted. (CAR 91, 343).

Ms. Rosario appeared before the Immigration Court again on October 2, 2007, and also on April 21, 2008. (CAR 89, 183). On April 21, 2008, her Application for Special Rule Cancellation of Removal was denied by Immigration Judge Robert P. Owens ("IJ"). (CAR 46). Ms. Rosario appealed to the Board of Immigration Appeals, raising substantial issues of law regarding the interpretation and application of the terms "battery" and "extreme cruelty." The Board of Immigration Appeals dismissed the appeal on August 18, 2009, affirming the IJ's decision that Ms. Rosario was ineligible for Cancellation of Removal. A timely appeal was then made to the Second Circuit Court of Appeals, which dismissed the appeal for lack of subject matter jurisdiction over what it considered to be a discretionary decision by the IJ and BIA regarding Ms. Rosario's eligibility for Special Rule Cancellation of Removal.

Ms. Rosario now respectfully petitions a writ of certiorari.

Reasons for Allowing the Writ

The Ninth Circuit is the only court that, upon considering the question whether a determination of eligibility for VAWA Special Rule Cancellation is a discretionary determination, has consistently and exclusively concluded that it is non-discretionary, and therefore reviewable. Although the minority on this issue – the 2nd, 5th, 7th, and 10th Circuits have concluded that this determination is discretionary and therefore not reviewable – the reasoning of the Ninth Circuit defers to a professional understanding of domestic violence, upholding the public policy and purpose behind VAWA Special Rule Cancellation and honoring Congressional intent. As such, the reasoning of the Ninth Circuit should be adopted by the Board of Immigration Appeals, and Immigration Judges, and circuit courts should no longer decline to review eligibility determinations on grounds of lack of jurisdiction.

I. The Definitions of "Battery" and "Extreme Cruelty" within 8 C.F.R. § 204.2(c)(1)(vi) Should Be Interpreted to Reflect a Clinical Understanding of Domestic Violence for the Purpose of Decisions Regarding Eligibility for Special Rule Cancellation under INA § 1229b(b)(2).

Courts agree on the general rule that factual determinations or based on objective standards or purely legal questions are non-discretionary and therefore reviewable. However, there is a conflict among the Circuits regarding whether a

determination of battery and/or extreme cruelty for the purposes of Special Rule Cancellation is discretionary or non-discretionary. To understand this conflict (and assess which court has the better approach), one must first consider the underlying principles of this general rule.

A. The Ninth Circuit Has Correctly Concluded That Determinations of Battery and Extreme Cruelty Are Factual Determinations – Physical and Psychological – and Therefore Non-Discretionary.

An alien is eligible for cancellation of removal under INA § 240A(b)(2) if the alien: (1) has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident; (2) has been continuously physically present in the United States for at least three years; (3) is a person of good moral character; (4) is not inadmissible due to commission of specified crimes; and (5) removal would result in extreme hardship to the alien, the alien's child, or to the alien's parent. 8 U.S.C. § 1229b(b)(2).

Section 1252(a)(2)(B) of Title 8 of the United States Code, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009-546 (1996), provides in relevant part that "no court shall have jurisdiction to review any judgment regarding the granting of relief under section . . . 1229b . . . of this title." 8 U.S.C. § 1252(a)(2)(B)(i). However, Circuit Courts have acknowledged that they have jurisdiction to review non-discretionary factual

determinations or pure questions of law arising under § 1229b. Such non-discretionary determinations include whether an immigrant is of "good moral character," whether an immigrant has committed a "crime of moral turpitude," and whether an immigrant has satisfied the physical presence requirement of section 1229b. *See Rodriguez v. Gonzales*, 451 F.3d 60, 62 (2d Cir. 2006) (holding that the Court may review whether a crime is one of moral turpitude precluding cancellation of relief); *Sepulveda v. Gonzales*, 407 F.3d 59, 62-63 (2d Cir. 2005) (holding that the Court may review whether an alien meets eligibility requirements, including good moral character and other non-discretionary decisions). *See also Hernandez*, 345 F.3d at 834, 835 (9th Cir. 2003) (stating that physical presence is non-discretionary).

The Ninth Circuit was the first court to consider whether a finding of "extreme cruelty" for VAWA relief was a discretionary or non-discretionary determination. *Hernandez*, 345 F.3d at 833. The Ninth Circuit found that extreme cruelty involves a question of fact determined through the application of legal standards, and that "the existence or nonexistence of battery is clearly a factual determination." *Id.* at 834. Acknowledging the jurisdiction-stripping provision of the IIRIRA, the Ninth Circuit in *Hernandez* stated that it retained jurisdiction to consider "elements of statutory eligibility which do not involve the exercise of discretion . . . ." *Id.* at 833 (internal quotation marks and citations omitted). "Ultimately, the question of whether an individual has experienced domestic violence in either its physical or psychological manifestation is a clinical one . . . ."

Id. at 834. As a result, the Ninth Circuit's conclusion is that whether a petitioner falls into the per se category of "battered spouse" under the statute is a non-discretionary determination reviewable by courts of appeals. *Id.* at 835.

1. Ninth Circuit approach

The Ninth Circuit's approach in *Hernandez* should be the model for future consideration of immigrants' eligibility for Special Rule Cancellation under INA section 1229b(b)(2).

In considering the actions of the petitioner's spouse in *Hernandez*, the Ninth Circuit noted that, although many actions may not appear cruel based on common understanding, "in enacting VAWA, Congress recognized that lay understandings of domestic violence are frequently comprised of 'myths, misconceptions, and victim blaming attitudes,' and that background information regarding domestic violence may be crucial in order to understand its essential characteristics and manifestations." *Id.* at 836 (citing H.R. Rep. No. 103-395 at 24). The Ninth Circuit thereby established the invaluable consideration that, in order to adequately evaluate an immigrant's argument that she should be granted cancellation of removal due to spousal abuse, a court "must first consider the nature and effects of violence in intimate relationships." *Id.* at 836.

a. context of domestic violence

Abusive intimate relationships generally follow a pattern referred to as the "cycle of violence,"

composed of a tension-building phase, a phase of acute abuse, and finally a phase in which the batterer attempts to gain forgiveness by claiming he has reformed. *Hernandez* at 836 (citing Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1208 (1993)). A court can refer to the victim's credible testimony, as well as credible testimony from any and all family or friends of the victim, to identify the presence of each phase of this cycle of violence; it is a factual determination requiring no judgment call.

Additionally, and also incredibly important, is the fact that in an abusive relationship, the abuse does not stop when physical abuse or battering is not occurring; abuse "pervades the entire relationship." *Id.* at 837. Domestic violence is characterized in large part by "psychological abuse, coercive behavior, and the ensuing dynamics of power and control . . . ." *Id.* As a result, clinical wisdom regarding abusive intimate relationships urges recognition that "the battered woman's fear, vigilance, or perception that she has few options may persist . . . even when the abusive partner appears to be peaceful and calm." *Id.* (citing Dutton at 1208).

Finally, the batterer's kindness is significant in that, in combination with his physical and psychological dominance over the victim, an abuser's kindness can result in the victim's dependence on the abuser. *Id.*

The Ninth Circuit also noted that, "[s]ignificantly, research . . . shows that women are often at the highest risk of severe abuse or death when they attempt to leave their abusers." *Id.*(citing Dutton at 1212, and H.R. Rep. No. 103-395 at 24).

As mentioned above, a court can determine if these factors of domestic violence and abuse are present in an immigrant's relationship simply by referring to the record of testimony and evidence. Although these factors are not specifically articulated in the INA or VAWA, the public policy behind the enactment of VAWA and Special Rule Cancellation calls for consideration of modern clinical knowledge of domestic violence for elucidation. Under INA § 1229b(2)(D), once a judge finds a fact to be true, then he must consider it; therefore, there is no need for a judgment call or discretionary determination to recognize the factors, articulated by the Ninth Circuit and professional wisdom regarding domestic violence, in recognizing an abusive relationship. As a result, it is indisputable that courts of appeals have jurisdiction to review the issue of whether an immigrant has been a battered spouse.

b. statutory analysis regarding "extreme cruelty"

Acknowledging that Congress distinguished between "battery" and "extreme cruelty" within the INA, the Ninth Circuit separately considered the meaning of the term "extreme cruelty." Rationally, the Ninth Circuit concluded that Congress's intention was that "battery" should be interpreted as physical abuse, and "extreme cruelty" should be interpreted as "something other than physical assault, presumably actions in some way involving mental or psychological cruelty." *Id.* at 838.

The Immigration and Nationalization Service ("INS") promulgated a regulation defining "battery"

and "extreme cruelty" for the purposes of the INA. The regulation states:

> [T]he phrase "was battered by or was the subject of extreme cruelty" includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse . . . shall be considered acts of violence. *Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are part of an overall pattern of violence.*

8 C.F.R. § 204.2(c)(1)(vi) (emphasis added). The Ninth Circuit thus concluded that "[d]efining extreme cruelty in the context of domestic violence to include acts that 'may not initially appear violent but that are part of an overall pattern of violence' is a reasonable construction of the statutory text at hand." *Hernandez* at 839.

Finally, the Ninth Circuit acknowledges a fact overlooked or ignored by all other Circuits that have addressed the definitions of "battery" and "extreme cruelty" for the purposes of the INA: VAWA relief "was a generous enactment, intended to ameliorate the impact of harsh provisions of immigration law on

abused women. Thus, [the Ninth Circuit's] interpretation . . . adheres to 'the general rule of construction that when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion . . . .'" *Id.* at 840.*See alsoOropeza-Wong v. Gonzales*, 406 F.3d 1135 (9th Cir. 2005).

2. Analysis of Circuits concluding that determination of battery and extreme cruelty are discretionary

Circuits outside the Ninth Circuit have used two main arguments that "battery" and "extreme cruelty" determinations by the BIA are discretionary and therefore beyond the jurisdiction of courts of appeals.

a. other circuits incorrectly assume that "extreme cruelty" is treated the same as "extreme hardship," and is therefore not a purely legal or factual determination

The Circuits that have considered the question all agree that a determination of extreme hardship is discretionary.*Kalkouli v. Ashcroft*, 282 F.3d 202 (2d Cir. 2002); *Kalaw v. INS*, 133 F.3d 1147 (9th Cir. 1997); *Escalera v. INS*, 222 F.3d 753 (10th Cir. 2000); *Valenzuela Alcantar v. INS*, 309 F.3d 946 (6th Cir. 2002); *Okpa v. INS*, 266 F.3d 313 (4th Cir. 2001); *Bernal-Vallejo v. INS*, 195 F.3d 56 (1st Cir. 1999); *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999); *Al Najjar v. Ashcroft*, 257 F.3d 1262 (11th Cir. 2001); *Skutnik v. INS*, 128 F.3d 512 (7th Cir. 1997). The

decision whether an immigrant or his family would suffer extreme hardship should he be removed from the United States involves "an exercise of judgment over and above mere ascertainment of facts." *Valenzuela*, 309 F.3d at 950. In other words, a decision is discretionary if the court involved is required to make a judgment call in order to come to a conclusion.

Extreme hardship is a discretionary decision because a court, in deciding whether extreme hardship exists in any particular situation, must assess the facts of the case, and then decide for itself whether those facts present as extreme hardship. As a result, what one court concludes is extreme hardship may not be extreme hardship to another court.

As noted elsewhere in this Petition, extreme cruelty is an entirely different factor than extreme hardship. Whether an immigrant has been battered by her spouse is a factual determination, arrived at objectively. Whether an immigrant has been treated extremely cruelly by her spouse is also a factual determination, based on clear-cut clinical factors set forth by clinical authorities in the field of domestic violence.

The argument that an analysis of "extreme cruelty" is identical to an analysis of "extreme hardship," *Ramdane*, 296 Fed.Appx. at 442; *Stepanovic v. Filip*, 554 F.3d 673, 679 (7th Cir. 2009), is a gross misinterpretation of statutory language and a disappointing cold shoulder to the type of analysis "extreme cruelty" deserves in any given case.

In *Ramdane*, the Sixth Circuit concluded that "extreme cruelty" is discretionary just as "extreme

hardship" is, simply because the Court "ha[d] been given no reason to believe that a decision regarding extreme cruelty is any different from a decision regarding extreme hardship, which is a discretionary decision and we do not have jurisdiction to review a discretionary decision." 296 Fed.Appx.at 448. This is an entirely inadequate analysis of a claim of extreme cruelty; in fact, this is no analysis at all. Even if, given the factors used by the Ninth Circuit, the Sixth Circuit in *Ramdane* would have reached the same conclusion due to the absence of other necessary factors, the immigrant deserves legitimate judicial consideration of his claim of abuse.

In *Stepanovic*, the Seventh Circuit acknowledged that "[a] 'pure' question of law arises in situations in which a case comes out one way if the Constitution or statute means one thing, and the other way if it means something different." 554 F.3d at 678 (internal citations omitted). The Court then fails to address whether interpretation of the term "extreme cruelty" meets this standard for a pure question of law, merely stating that the Seventh Circuit has "held repeatedly that an analogous issue is *not* subject to judicial review: whether an alien will suffer 'exceptional and extremely unusual hardship' . . . ." *Id.* Likewise, in *Ramdane*, the Sixth Circuit concluded that "extreme cruelty" is discretionary just as "extreme hardship" is. Without any explanation, that Court found that it "ha[d] been given no reason to believe that a decision regarding extreme cruelty is any different from a decision regarding extreme hardship, which is a discretionary decision and we do not have jurisdiction to review a discretionary decision." 296 Fed.Appx.at 448.

The meaning of INA § 1229b is obviously a purely legal question. The statute means what the Ninth Circuit proposes; therefore, the eligibility standards pursuant to that statute are different from those that have been applied by other circuits.

b. other circuits incorrectly allege that INA § 1229b is ambiguous and broad

Some circuits have concluded that a determination of battery or extreme cruelty is a discretionary one based solely on the fact that the definition in the INA is broad on its face. *Perales-Cumpean*, 429 F.3d at 983; *Stepanovic* at 680; *Wilmore v. Gonzales*, 455 F.3d 524, 528 (5th Cir. 2006). However, as explained in Section I.B.1. of this petition, *supra*, the definitions of "battery" and "extreme cruelty" provided in the INA are structured in such a way that encourages interpretation of the statute in light of current wisdom regarding domestic violence. A statute defining battery and extreme cruelty for the purpose of aiding immigrants in escaping from abusive relationships could not be so specific as to be unambiguous on its face; attempting to draft it so would display an ignorance of the intricacies of domestic violence and its symptoms. However, as the Ninth Circuit has explained, a consideration of clinical knowledge regarding domestic violence reveals black-and-white factors that, when applied to facts on a case-by-case basis, elucidate the statute and, therefore, the analysis of whether an immigrant has been battered or treated extremely cruelly; this application requires no judgment call on the part of an

Immigration Judge, the BIA, or a court of appeals, and therefore is non-discretionary and reviewable.

B. Courts Agree That Factual Determinations Based on Objective Standards, Such as Pure Questions of Law, are Non-Discretionary and Therefore Reviewable.

Under 8 U.S.C. 1252(a)(2)(B), no court has jurisdiction to review:

> (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 . . . or
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security . . . .

The Attorney General's grant of authority to determine an alien's eligibility under Section 1229b is discretionary authority. Therefore, if a court of appeals is reviewing a decision by the Board of Immigration Appeals, it has jurisdiction to review only constitutional claims or factual determinations based on objective standards, such as pure questions of law. 8 U.S.C. § 1252(a)(2)(D). Issues of discretionary interpretation are out of the realm of jurisdiction for courts of appeal. *Hernandez v.*

Ashcroft, 345 F.3d 824 (9th Cir. 2003); *Barco-Sandoval v. Gonzales*, 516 F.3d 35 (2d Cir. 2008); *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001 (9th Cir. 2003); *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315 (2d Cir. 2006); *Perales-Cumpean v. Gonzales*, 429 F.3d 977 (10th Cir. 2005); *Mendez v. Holder*, 566 F.3d 316 (2d Cir. 2009); *Ramdane v. Mukasey*, 296 Fed.Appx. 440 (6th Cir. 2008); *Johnson v. AG of the United States*, 602 F.3d 508 (3rd Cir. 2010); *Morales Ventura v. Ashcroft*, 348 F.3d 1259 (10th Cir. 2003).

The question then becomes whether a determination of eligibility for special rule cancellation is a discretionary or non-discretionary determination.

II. Since the Clinical Understanding of Domestic Violence is Reflected in the Definitions of These Terms, Decisions Regarding Eligibility for Special Rule Cancellation Are Factual, Non-Discretionary Determinations, Reviewable by Courts of Appeals.

Determinations of battery and extreme cruelty must be non-discretionary in order to give effect to the statutes enacted to define those terms and protect battered individuals.Considering the generosity and public policy behind INA § 1229b(b)(2), it is difficult to believe that Congress intended by its enactment "to commit the determination of what constitutes domestic violence to the sole discretion of immigration judges." *Hernandez* at 835 (citing H.R. Rep. No. 103-395 at 25-27, 37-38). Why is such steep deference granted to the determinations of battery and extreme cruelty by immigration judges and the BIA, who have no

professional training or knowledge behind them regarding the dynamics of domestic violence? The only logical conclusion is that Congress intended, by enactment of the special rule provision in the INA, to encourage immigration judges and the BIA to consider modern clinical knowledge of the subject to enlighten their determinations of the presence or absence of battery or extreme cruelty on a case-by-case basis. An IJ's or the BIA's failure to do so should be plain legal error reviewable by courts of appeals.

A. The Violence Against Women Act Amended the Immigration and Nationality Act for the Purpose of Protecting Battered Immigrant Spouses of United States Citizens or Legal Permanent Residents.

1. Brief legislative history

Congress first enacted the Violence Against Women Act ("VAWA") in 1994. Prior to the enactment of VAWA, the immigration laws in place in the United States "unwittingly fostered the abuse of many immigrant women by giving the abuser – the U.S. citizen or lawful permanent resident spouse -- control over the immigrant spouse's ability to gain permanent lawful immigration status." (*Amicus* Brief, 7 ("AB")). The initial enactment of VAWA established a suspension of deportation remedy for immigrants who have been battered or treated extremely cruelly by citizen or lawful permanent resident spouses. (AB 8). This provision gave the Attorney General discretion to suspend deportation and adjust status for these immigrants, (id.), based

on "any credible evidence relevant to the application." (INA § 240A(b)(2)(D)).

In October 2000, Congress passed the Battered Immigrant Women Protection Act as part of the Violence Against Women Act of 2000 ("VAWA 2000"). (AB 8). The Illegal Immigration Reform and Responsibility Act of 1996 ("IIRIRA") eliminated the suspension of deportation remedy VAWA had created in 1994, replacing it with special VAWA cancellation of removal. IIRIRA § 304. VAWA 2000 "aided battered immigrants by eliminating residual obstacles impeding [those] seeking to escape from abusive relationships." (AB 8-9). VAWA was again reauthorized in 2005.

2. Purpose and philosophy of enactment

Congress seeks, via VAWA, to "remedy the legacy of laws and social norms that serve to justify violence against women," Office on Violence Against Women, *Working Together to End the Violence*, http://www.ovw.usdoj.gov/docs/vawa.pdf (last visited Feb. 17, 2011), and to "eliminate barriers to women leaving abusive relationships." *Hernandez*, 345 F.3d at 841. "[I]n enacting VAWA, Congress recognized that lay understandings of domestic violence are frequently comprised of 'myths, misconceptions, and victim blaming attitudes,' and that background information regarding domestic violence may be crucial in order to understand its essential characteristics and manifestations." *Id.* at 836 (citing H.R. Rep. No. 103-395 at 24). By amending the INA with the special rule cancellation provision in § 1229b, Congress intended that Immigration Judges, the BIA, and the United States Court

system would utilize an advanced understanding of the dynamics of domestic violence to be sensitive to and protect immigrants in abusive relationships with United States citizens and legal permanent residents.

B. Interpreting Battery and Extreme Cruelty to Exclude Spouses Who Suffer Psychological Abuse and Trauma Eviscerates the Violence Against Women Act and the Legal Standard in 8 C.F.R. § 204.2(c)(1)(vi).

VAWA "was a generous enactment, intended to ameliorate the impact of harsh provisions of immigration law on abused women." *Hernandez* at 840. The Ninth Circuit's approach to interpreting INA § 1229b(b)(2) is far superior to those of the other Circuits that have approached the issue. The Ninth Circuit "adhere[s] to the general rule of construction that when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion." *Id.* (internal quotation marks omitted).

To interpret INA § 1229b(b)(2) in such a way that spouses who suffer psychological abuse and trauma without any proven accompanying physical injury are excluded from relief, eviscerates VAWA, Congressional intent, and the legal standard articulated in 8 C.F.R. § 204.2(c)(1)(vi). Immigration judges and the BIA should be required to interpret the Special Rule Cancellation provision in light of current clinical wisdom regarding domestic violence and abuse, pursuant to the language of 8 C.F.R. § 204.2(c)(1)(vi); failure to do so does a great disservice to the public policy behind the provision, to speak

nothing of the immigrants in need of its relief. Should immigration judges and the BIA fall short of the standard set by the Ninth Circuit, courts of appeals should not eschew the opportunity to review this non-discretionary determination, and should act upon Congress's intent to protect immigrants who suffer psychological abuse and trauma, as well as physical battering, at the hands of a United States citizen or legal permanent resident spouse.

III. Slippery Slope Concerns are Insignificant in Light of the Ninth Circuit's Analysis.

Circuits outside the Ninth Circuit pose a concern that a generous analysis like the Ninth Circuit's would lead to a slippery slope; wouldn't all immigrants married to U.S. citizens or legal permanent residents claim battery and extremely cruel treatment as a last resort? Wouldn't the Ninth Circuit's analysis result in the granting of Special Rule Cancellation to immigrants who do not deserve it? "[I]f suffering from degrading language, being cursed at, being kicked out of the house, having difficulties seeing the child, and various threats which never have any substance constitutes battering, then virtually every person who is party to a difficult divorce is a battered spouse and that clearly is not the intention of Congress in enacting the Violence Against Women Act." *Ramdane*296 Fed.Appx.at 448 (internal quotation marks omitted).

It is important to recognize that most of the cases that were denied by the Circuit Courts would still be denied under the Ninth Circuit's analysis. For example, in *Ramdane*, the respondent claimed he was entitled to relief because his spouse was

physically and verbally abusive, changed the locks on the doors of their house while he was at work and threatened to have him deported. *Id.* at 448. However, the Immigration Judge found that the respondent lacked credibility and the application was "disingenuous to the verge of being fraudulent. *Id.* at 444. The Ninth Circuit's analysis does not require that *Ramdane* be granted relief; rather, it requires review of whether he meet the clinical definition of battery. Ramdane would not meet the definition because he lacked credible testimony of abuse. Likewise, in *Perales-Cumpean*, the Tenth Circuit properly denied Special Rule Cancellation where the respondent "changed her story during the hearing and from previous affidavits she had filed concerning the alleged abuse and marital rape, making her testimony on these subjects not credible." 429 F.3d at 980. Therefore, even under the Ninth Circuit's analysis, the result would have still been removal for the alien in these cases.

Furthermore, it cannot be ignored that, in Special Rule Cancellation cases, immigration judges and the BIA are considering factors and eligibility requirements beyond domestic violence. INA § 1229b(b)(2)(A) also requires that the immigrant have been physically present in the United States for at least three continuous years, that the immigrant be of good moral character, that the immigrant not have been convicted of an aggravated felony, and that removal would result in extreme hardship to the immigrant, her child, or her parent. Therefore, even if an immigration judge, the BIA, or a court of appeals applies the Ninth Circuit's analysis and finds that the immigrant is a battered spouse for the

purposes of Special Rule Cancellation, that immigrant could still be removed on other grounds.

The Ninth Circuit's correct application of the statutory language provides for the proper analysis of Special Rule Cancellation such that these women can receive the relief they so badly need. In the Ninth Circuit's *Hernandez* case, the immigrant satisfied all other cancellation requirements, and the analysis rested entirely on the analysis of battery and extremely cruel treatment. *Hernandez* would have come out unfavorably to the immigrant if the Ninth Circuit had adopted the statutory interpretation of other circuits and therefore denied jurisdiction to review the BIA's decision; a woman who had been padlocked into her house and stabbed by her husband with a knife would have received no relief under the INA.

IV. This is an Important Federal Question Recurring in Courts across the Nation and Consistently Harming Abused Individuals.

The conflict in the courts regarding the discretionary or non-discretionary nature of a determination of eligibility for Special Rule Cancellation under INA § 1229b(b)(2) is fundamental to the carrying-out of Congress's intentions when it enacted the provision. Should the analysis of the Ninth Court not be adopted across the nation, immigrant spouses of citizens and legal permanent residents will continue to be overlooked by the interpretation of the very statute put in place to protect them.

The analyses conducted and conclusions arrived at by the immigration judge, Board of

Immigration Appeals, and Court of Appeals for the Second Circuit in this case have disregarded the abuse – both physical and psychological – suffered by the Petitioner, and have therefore eviscerated the purpose of INA § 1229b(b)(2). Future approaches to this statute should follow the example of the Ninth Circuit, and apply current clinical wisdom regarding domestic violence in the application of this provision on a case-by-case basis.

This case presents the proper opportunity to resolve the conflict in the courts of appeals on these fundamental questions of statutory interpretation and application.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH2011

APPENDIX A

09-3877-ag
Rosario v. Holder

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Argued: Sept. 1, 2010 Decided: Dec. 6, 2010

Docket No. 09-3877-ag

JOSEFA ROSARIO,

Petitioner,

v. 09-3877-ag

ERIC H. HOLDER, JR., in his capacity as
United States Attorney General,

*Respondent.**

Before: DENNIS JACOBS, *Chief Judge,*
REENA RAGGI, *Circuit Judge,*
JED S. RAKOFF,** *District Judge.*

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*The Clerk of Court is respectfully instructed to amend the official case caption as shown above.

**The Honorable Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

Petitioner, a citizen of the Dominican Republic, seeks cancellation of removal as an abused spouse under the amended Immigration and Naturalization Act. 8 U.S.C. § 1229b(b)(2). An Immigration Judge concluded that Rosario was not "battered or subjected to extreme cruelty" as defined by the statute and therefore did not warrant discretionary cancellation of removal, and the Board of Immigration Appeals affirmed. We dismiss the petition for lack of subject matter jurisdiction because the BIA's decision raises no constitutional claims or questions of law.

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DENNIS JACOBS, *Chief Judge*:

The Petitioner, Josefa Rosario, is a citizen of the Dominican Republic who seeks cancellation of removal as an abused spouse under the amended Immigration and Naturalization Act. 8 U.S.C. § 1229b(b)(2). An Immigration Judge ("IJ") found that Rosario was not "battered or subjected to extreme cruelty" within the

meaning of the statute and therefore did not warrant discretionary cancellation of removal. The Board of Immigration Appeals ("BIA") affirmed. We dismiss Rosario's petition for lack of subject matter jurisdiction because the BIA's decision raises no constitutional claims or questions of law.

BACKGROUND

Rosario was found credible by the IJ; we therefore adduce the facts to which she testified.

Rosario entered the United States on a one-month non-immigrant tourist visa in 1994. After overstaying by approximately two years, she married Pedro Martinez, a U.S. citizen, and petitioned to adjust her status to Legal Permanent Resident in 1996.

The marriage soured soon after the petition was filed, and Martinez became aggressive and insulting. There were approximately five incidents of physical abuse or intimidation in the three-month period between June 1997 and September 1997, when Martinez was jailed (for offenses unrelated to Rosario). There are no allegations of abuse after his release from prison in 2000.

During the incidents of abuse, Martinez (variously) grabbed Rosario by the arms and shoulders, shook her, verbally insulted her, and threw her on the bed. Martinez also demanded money from her and threatened to withdraw her application for a Green Card. Rosario did not report these incidents to the police or seek medical attention.

During this time, Rosario's Green Card application languished, and, in 2000, it was denied as abandoned. In 2002, the Department of Homeland Security served Rosario with a Notice to Appear and charged her with removal.

At her Notice to Appear hearing, Rosario admitted she was in the U.S. illegally and conceded removability. Soon afterward, she filed a petition for Special Rule Cancellation of Removal under 8 U.S.C. § 1229b(b)(2)(A), which gives the Attorney General discretion to cancel the removal of an otherwise deportable alien who has been "battered or subjected to extreme cruelty" by her U.S. citizen spouse.

In 2008, an IJ denied Rosario's petition, concluding that she had not been "battered or subjected to extreme cruelty." Rosario appealed this decision to the BIA, which affirmed. Rosario now seeks review in this Court.

DISCUSSION

I.

As part of the 1994 Violence Against Women Act, Congress granted the Attorney General discretion to cancel the removal of otherwise deportable aliens who were found to have been "battered or subjected to extreme cruelty" by their U.S. citizen spouses. Pub.L. No. 103-322, § 40703, 108 Stat. 1796, 1955 (1994) (codified at 8 U.S.C. § 1229b(b)(2)(A)). The five requisites for this relief are:

(1) "the alien has been battered or subjected to extreme cruelty by a spouse" who is a U.S. citizen or permanent resident;

(2) "the alien has been physically present in the United States for a continuous period of not less than 3 years";

(3) "the alien has been a person of good moral character during such period";

(4) "the alien ... has not been convicted of an aggravated felony"; and

(5) "the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent."

8 U.S.C. § 1229b(b)(2)(A)(i)-(v).

The determination as to whether an alien should be given this discretionary cancellation of removal is made by an IJ subject to appeal to the BIA. In 1996, Congress stripped the federal courts of jurisdiction to review these discretionary rulings. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. No. 104-208, § 306, 110 Stat. 3009, 3009-607 (codified at 8 U.S.C. § 1252(a)(2)(B)(i)).

Concerned that a complete ban on judicial review of BIA determinations might violate the Suspension Clause, the Supreme Court in 2001 construed the jurisdictional ban to allow for limited federal court review of BIA decisions. *INS v. St. Cyr,* 533 U.S. 289, 307, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001).Specifically, the Court held that even where the

Attorney General had discretion over whether to grant cancellation of removal, the alien was nevertheless entitled to a determination of whether she was *eligible* for discretionary cancellation, and that this determination of eligibility was reviewable in the U.S. Circuit Courts when it was "governed by specific statutory standards." *Id.* Thus, while the federal courts retained jurisdiction to review the legal question of statutory eligibility, the Attorney General's exercise of discretion could not be second-guessed.

The REAL ID Act of 2005 amended the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") to obviate the Supreme Court's Suspension Clause concerns. Pub.L. No. 109-13, § 106, 119 Stat. 231, 310 (codified in at 8 U.S.C. § 1252(a)(2)(D)); *see also Xiao Ji Chen v. Gonzales*, 471 F.3d 315, 326 (2d Cir.2006)(describing legislative history of REAL ID Act). The REAL ID Act prescribed an exception to the general ban on judicial review of BIA decisions for Circuit Court review of "constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(D).

In the wake of *St. Cyr* and the REAL ID Act, this Court described the scope of its jurisdiction to review BIA determinations in two ways. First, based on *St. Cyr*, we stated that we could review those "nondiscretionary decisions" by the BIA that underlie its exercise of discretion in granting or denying cancellation of removal. *See, e.g., Rodriguez v. Gonzales*, 451 F.3d 60, 62 (2d Cir.2006) (describing scope of review as over nondiscretionary determinations underlying discretionary relief); *Sepulveda v. Gonzales*, 407 F.3d 59, 62-63 (2d Cir.2005). Later, based on the REAL ID Act, we stated

that we could review "all constitutional claims or questions of law" raised by the BIA's exercise of its discretion. *See, e.g., Argueta v. Holder*, 617 F.3d 109, 112 (2d Cir.2010) (describing scope of review as over constitutional and legal questions). These two characterizations, which may appear to be two separate avenues of jurisdiction, are congruent: BIA statutory interpretation pursuant to an eligibility determination is nondiscretionary and therefore reviewable precisely because it presents a legal question. In contrast, the BIA's factfinding, factor-balancing, and exercise of discretion normally do not involve legal or constitutional questions, so we lack jurisdiction to review them.

II.

When the BIA's decision explicitly rests on a legal prescription or statutory interpretation, we unambiguously have jurisdiction to review it. *SeeSepulveda*, 407 F.3d at 63 (holding that court has jurisdiction to review BIA determination that alien is ineligible for discretionary relief as a matter of law). Similarly, when the BIA explicitly finds an alien to be eligible for discretionary relief but then refuses to grant relief as an exercise of its discretion, such a decision is not reviewable. Determining whether we have jurisdiction to review is more difficult when the BIA is engaged in the application of law to facts.

We determine our jurisdiction by looking at the *underlying nature* of the BIA's determination rather than any gloss offered by the parties. *Argueta*, 617 F.3d at 112("We do not rely solely on a petitioner's description of his claims, but scrutinize a petitioner's arguments to determine

whether they raise reviewable questions." (internal quotation marks omitted)); *Barco-Sandoval v. Gonzales*, 516 F.3d 35, 39 (2d Cir.2008) ("[A] petitioner cannot us[e] the rhetoric of a constitutional claim or question of law to disguise what is essentially a quarrel about fact-finding or the exercise of discretion." (internal quotation marks omitted)). We ask whether the BIA is expressing legal doctrine or whether it is engaged in the factfinding and factor-balancing that are at the core of its discretion.

Although, in some sense, every BIA decision involves the application of law to fact, not every such decision is reviewable. *See Xiao Ji Chen*, 471 F.3d at 331 ("The mere use of the term 'erroneous application' of a statute will not, however, convert a quarrel over an exercise of discretion into a question of law."). The mixed questions of law and fact in BIA decisions are reviewable in three situations:

> (1) Where the BIA applies the wrong statute, misinterprets the correct statute, or uses an erroneous legal standard;
>
> (2) Where the BIA's underlying factual determination is "flawed by an error of law"; and
>
> (3) Where the BIA's conclusion is "without rational justification," meaning it is located so far outside the range of reasonable options that it is erroneous as a matter of law.

See Mendez v. Holder, 566 F.3d 316, 322 (2d Cir.2009) (articulating three situations); *Barco-*

Sandoval, 516 F.3d at 39 (same); *Xiao Ji Chen*, 471 F.3d at 329 (same). Except in these scenarios, the BIA's application of law to fact amounts to the exercise of its discretion and does not raise the legal or constitutional question required for our jurisdiction.

III.

Every new petition to review a BIA decision requires us to make a jurisdictional inquiry: first asking whether the BIA's decision involves a clear legal prescription; second, where the decision only involves the application of clearly established law to a set of facts, asking whether the BIA's determination comes within any of the three specific scenarios that justify review.

This Circuit has already considered our jurisdiction to review BIA rulings on certain other aspects of abuse-based cancellation of removal. In *Rodriguez v. Gonzales*, 451 F.3d 60 (2d Cir.2006), we held that whether an alien has been convicted of an aggravated felony always presents a legal question and is therefore nondiscretionary and reviewable. *Id.* at 62-63. Similarly, in *Sepulveda v. Gonzales*, 407 F.3d 59 (2d. Cir.2005), we suggested, but did not hold, that whether an alien satisfies the continuous physical presence requirement also presents a legal question and its therefore reviewable. *Id.* at 63. In *Sepulveda*, we also reviewed a BIA ruling that criminal convictions legally preclude finding that the alien is of "good moral character." *Id.* at 63-64. Although the fact-specific nature of a moral character assessment ordinarily suggests that it would constitute an exercise of discretion not a legal determination, we held in *Sepulveda* that the BIA's ruling on moral character presented a legal question in that particular

case because it was explicitly premised on the criminal convictions *as a matter of law*. *Id.*

In contrast, in *Barco-Sandoval v. Gonzales*, 516 F.3d 35 (2d Cir.2008), and *Mendez v. Holder*, 566 F.3d 316 (2d Cir.2009), we held that whether an alien would suffer "extreme hardship" if deported ordinarily does not require statutory interpretation but instead involves the application of the law to particular facts. Thus, we lack jurisdiction to review such determinations unless they fall into one of the three categories described in Part II.

IV.

Now, we must decide whether we have jurisdiction to review BIA determinations as to whether a spouse has been "battered or subjected to extreme cruelty." Like "extreme hardship" and unlike criminal conviction or continuous physical presence, whether an alien has been "battered or subjected to extreme cruelty" under the statute generally entails a factual judgment, not a legal prescription.

This conclusion finds support in the fact that Congress did not provide a specific statutory definition for the terms, and in the fact that the regulatory gloss on the terms, while requiring more than the unwanted touching of common law battery, contemplates the exercise of considerable discretion in assessing the totality of the circumstances. *See* 8 C.F.R. § 204.2(c)(1)(vi).[1]

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[1] 8 C.F.R. § 204.2(c)(1)(vi) permits an abused spouse of a United States citizen or a lawful permanent resident to self-petition for an adjustment of status. The regulation states that the phrase "was

Thus, BIA determinations as to whether an alien has been "battered or subjected to extreme cruelty" require the application of law to fact, rather than statutory interpretation. As such, we have jurisdiction to review these determinations only when the BIA applies an incorrect law or legal standard, bases its decision on a factfinding premised on an error of law, or reaches a conclusion that lacks any rational justification.

Finally, we observe that all but one of our sister circuits who have considered this question have reached the same conclusion. *Johnson v. Attorney Gen.*, 602 F.3d 508, 511 (3d Cir.2010) (holding that BIA "extreme cruelty" determination is discretionary and not reviewable); *Stepanovic v. Filip*, 554 F.3d 673, 679-80 (7th Cir.2009) (same); *Ramdane v. Mukasey*, 296 F. App'x 440, 442 (6th Cir.2008); *Wilmore v. Gonzales*, 455 F.3d 524, 527 (5th Cir.2006); *Perales-Cumpean v. Gonzales*, 429 F.3d 977, 982 (10th Cir.2005). *But see Hernandez v. Ashcroft*, 345 F.3d 824, 835 (9th Cir.2003) (holding that BIA "extreme

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battered by or was the subject of extreme cruelty" includes, but is not limited to:

> being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence.

cruelty" determination is nondiscretionary and reviewable).

V.

Rosario's petition turns on the question whether she qualifies as "battered or subjected to extreme cruelty." Therefore, the BIA's decision in this case involves the application of law to fact: a determination of whether Rosario's situation rendered her "battered or subjected to extreme cruelty" under the statute. Rosario's petition therefore does not automatically raise a legal or constitutional issue; it only does so where the BIA applied the wrong law or misapplied the appropriate law or legal standard, based its decision on a factual finding premised on a legal error, or reached a conclusion so far outside the range of reasonable options as to be without rational justification.

Here, the BIA applied the correct law, 8 U.S.C. § 1229b(b)(2)(A)(i), and the correct legal standard, 8 C.F.R. § 204.2(e)(1)(vi), to Rosario's case. There were no legal errors underlying any of the factual findings the BIA used to reach its decision. And given the level of abuse Rosario claims to have suffered, it cannot be said that the BIA's conclusion was without rational justification. Thus, the BIA's decision does not fall within any of the three scenarios where we retain jurisdiction to review.

Ultimately, the question whether the abuse Rosario suffered qualifies her for cancellation of removal is not answered by legal analysis but entails a weighing of facts and circumstances, the sort of value judgment that lies at the core of the BIA's exercise of discretion. The BIA's reasoning can be described as an

application of law to fact, but that characterization cannot convert a factual determination into a legal question. Because the BIA's decision raised no question of law, we may not second-guess its discretionary factual judgment that Rosario is not eligible for cancellation of removal. Therefore, we lack jurisdiction to hear Rosario's petition.

CONCLUSION

For the foregoing reasons, we dismiss Rosario's petition for review from an order of the Board of Immigration Appeals for lack of jurisdiction.

APPENDIX B

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A074 915 199 – Hartford, CT

Date: Aug. 18, 2009

In re: JOSEFA ROSARIO

IN REMOVAL PROCEEDINGS

APPEAL

On Behalf of Respondent: Glenn L. Formica, Esquire

Application: Cancellation of Removal

The respondent has appealed the Immigration Judge's April 21, 2008, decision denying her application for special rule cancellation of removal pursuant to section 240A(b)(2) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1229b(b)(2). The appeal will be dismissed.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under a "clearly erroneous" standard, and review all other issues, including whether the parties have met their relevant burden of proof, and issues of

discretion, under a *de novo* standard. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii); *see also Matter of V-K*, 24 I&N Dec. 500 (BIA 2008); *Matter of A-S-B*, 24 I&N Dec. 493 (BIA 2008).

To establish eligibility for special rule cancellation of removal under section 240A(b)(2) of the Act, the respondent has the burden of establishing, *inter alia*, that she "has been battered or subjected to extreme cruelty by a spouse . . . who is or was a United States citizen." Section 240A(b)(2)(A)(i)(I) of the Act. While the phrase "battered or subjected to extreme cruelty" is not defined in the statutory provisions for special rule cancellation of removal, the regulations defining a similar phrase in the context of visa self-petitions provides instructive guidance in determining the parameters of the phrase as applied in the context of special rule cancellation of removal. The regulations defined "was battered by or was the subject of extreme cruelty," as including, but not limited to:

> being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not

> initially appear violent but are part of an overall pattern of violence.

8 C.F.R. § 204.2(e)(1)(vi).

We adopt and affirm the Immigration Judge's determination that the respondent failed to meet her burden of establishing her eligibility for special rule cancellation of removal under section 240A(b)(2) of the Act. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994). As found by the Immigration Judge, the respondent credibly testified that in four or five occasions, her husband shook her, pushed her and used bad words in the process of demanding money from her. When the respondent relented to her husband's demands, he would thereafter leave the house and "disappear" for a few days. The respondent emphasizes on appeal that her husband made her "feel bad," and that her body and arms hurt (Tr. at 61-62). The Immigration Judge, however, properly found that the respondent testified that she did not suffer any physical harm or injury that required any medical attention (Tr. at 79; I.J. at 6). While the respondent correctly notes that psychological injury is included in 8 C.F.R. § 204.2(e)(1)(vi), the examples of harm listed in the regulations, such as rape, molestation, incest or forced prostitution, are of a more extreme nature than what the respondent has alleged in the instant case, that of her husband's use of offensive language and her uncertainty as to what her husband might do when he returned to the house (*see* Tr. at 79-80). As noted by the Immigration Judge, the respondent has not provided any medical or psychological reports in support of her application, which may have otherwise provided some objective insight as to the extent or

seriousness of the psychological impact the husband's mistreatment has had on the respondent.

We find no merit in the respondent's arguments on appeal that the Immigration Judge improperly held her to a higher burden of proof by requiring police or medical records. The Immigration Judge's decision to deny the respondent's application was not based solely on the respondent's failure to provide police or medical reports, but because the respondent's testimonial evidence did not, on their own, adequately describe the requisite level of harm contemplated in section 240A(b)(2) of the Act. On this record, and cognizant of our deferential standard of review, we are unable to conclude that the Immigration Judge's factual findings are clearly erroneous, and that he erred in ultimately concluding that the facts to which the respondent and her witness testified do not sufficiently establish that the respondent was "battered or subjected to extreme cruelty" by her United States citizen spouse, as required for special rule cancellation of removal under section 240A(b)(2) of the Act. Accordingly, the respondent's appeal of the Immigration Judge's decision to deny her application for special rule cancellation of removal will be dismissed.

Because the respondent did not establish that she was "battered or subjected to extreme cruelty" by her United States citizen spouse, there is no need to address whether the respondent has satisfied the "extreme hardship" requirement for special rule cancellation of removal. The following order shall be entered.

ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security ("DHS"). *See* section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b); *see also* 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to voluntarily depart the United States, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to voluntarily depart the United States within the time period specified, or any extension granted by the DHS, the respondent shall be subject to a civil penalty as provided by the regulations and the statute and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act. *See* section 240B(d) of the Act.

WARNING: If the respondent files a motion to reopen or reconsider prior to the expiration of the voluntary departure period set forth above, the grant of voluntary departure is automatically terminated; the period allowed for voluntary departure is not stayed, tolled, or extended. If the grant of voluntary departure is automatically terminated upon the filing of a motion, the penalties for failure to depart under section 240B(d) of the Act shall not apply. *See* Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition

for Review, 73 Fed. Reg. 76,927, 937-38 (Dec. 18, 2008) (to be codified at 8 C.F.R. §§ 1240.26(c)(3)(iii), (e)(1)).

WARNING: If, prior to departing the United States, the respondent files any judicial challenge to this administrative final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent files a petition for review and then departs the United States within 30 days of such filing, the respondent will not be deemed to have departed under an order of removal if the alien provides the DHS such evidence of his or her departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. *See* 73 Fed. Reg. at 76938 (to be codified at 8 C.F.R. § 1240.26(i)).

/s/
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Hartford, Connecticut

File No.: A 74 915 199 April 21, 2008

In the Matter of	)	
	)	
JOSEFA ROSARIO	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	

CHARGE: Section 237(a)(1)(B) – remained longer than permitted.

APPLICATION: Cancellation of removal pursuant to 240A(b) and voluntary departure.

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
	John Marley
Holly B. Wargo	Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

Josefa Rosario, the respondent herein, is a 53-year-old native and citizen of the Dominican Republic. She was admitted to the United States as a visitor on or about February 7, 1994, at or near Miami, Florida. On August 30, 2002, the respondent was served with a Notice to Appear. *See* Exhibit 1. The NTA charges that because the respondent remained in the United

States longer than permitted, she is subject to removal pursuant to Section 237(a)(1)(B) of the Immigration and Nationality Act.

Respondent, acting through counsel, has admitted to the allegations contained in the complaint and has conceded removability as charged. Based upon respondent's admission, the Court finds that removability has been established by clear, convincing, and unequivocal evidence within the standard of *Woodby v. INS*, 385 U.S. 276 (1966).

The Court will now address the issue of relief. Respondent herein requested relief in the form of cancellation of removal under Section 240A(b)(2), essentially that is for a battered spouse or child. The respondent has also requested alternative relief in the form of voluntary departure.

STATEMENT OF THE LAW

Special Rule Cancellation for Battered Spouse or Child, Section 240A(b)(2)

An Immigration Judge may cancel removal and adjust the status of an alien lawfully admitted for permanent residence an alien who was inadmissible or deportable from the United States if the alien demonstrates: (1) that the alien, in fact, has been battered by an LSC or a USC husband or parent; (2) the alien must demonstrate that they have been physically present in the United States for a continuous period of not less than three years; (3) the alien must also demonstrate that he or she has been a person of good moral character during this time period; (4) the alien must also demonstrate that they are not inadmissible from the United States because of any security related grounds or criminal convictions; and

(5) the alien must also demonstrate that their removal would constitute extreme hardship for the alien or the alien's child or parent.

Voluntary Departure

The Attorney General may grant voluntary departure in a situation where the applicant demonstrates that they have: (1) been physically present in the United States for at least one year prior to the request for voluntary departure; (2) that they have been a person of good moral character for the past five years; (3) that they are eligible to post a voluntary departure bond which must be in the minimum amount of $500; (4) that they have the financial means to purchase a ticket for their departure from the United States; and (5) that they are willing to do so if ordered by the Immigration Judge.

FINDINGS OF THE COURT

The Court notes, first of all, that two witnesses testified in these proceedings. The testimony of the witnesses was taken on a bifurcated basis. The respondent was the lead witness, and she provided her primary testimony to the Court on October 2, 2007. The second witness was the respondent's sister, Emma Rosario, who provided testimony in Court today.

With regard to the testimony provided by the respondent, the Court found the respondent's testimony to be credible testimony. The Court believed the respondent's testimony was consistent with the information submitted in the application for cancellation. The Court further found that the testimony of the respondent was spontaneous. It was detailed, and the Court also had the benefit of being able to observe the respondent during the delivery of

her testimony. The Court was able to discern nothing in the respondent's actions or movement that suggested in any way to the Court that she was attempting to be deceptive. Therefore, the Court makes no adverse credibility finding relative to testimony of the respondent and in fact credits the respondent's testimony.

Similarly, the testimony of the respondent's sister, Ms. Emma Rosario, was also credible testimony, at least in the view of the Court. The sister's testimony was much more limited in scope and dealt primarily with the relationship between seeing her sister, the respondent herein, and what she, the sister, knew about the respondent's problems with the husband.

The Court found that, even though the testimony of the sister was limited, it was nonetheless worthy of credibility. Therefore, the Court makes no adverse credibility finding with regard to that testimony, either, and indeed does credit the testimony of the respondent's sister.

Turning now to the requested form of relief, that is cancellation of removal under Special Rule. The Court notes, first of all, that there are five elements that have to be satisfied in order to be granted Special Rule Cancellation. In this particular case, it is necessary that the application demonstrate, one, that she has been battered or abused by either a United States citizen or LPR husband; in this case, her United States citizen husband. Two, the respondent must demonstrate that she has present [sic] in the United States at least three years on a continual basis. She must demonstrate that she has been a person of good moral character for each of these three years. She must also demonstrate that she is not inadmissible from the United States for any protected ground, such

as criminal violations or security threats to the United States or the use of fraudulent documents. Finally, the applicant must demonstrate her removal would lead to extreme hardship on behalf of either herself, or her child, or her parent.

In looking at the evidence in this case, the respondent satisfies clearly three of the requirements almost without thinking. The respondent has been in the United States nearly 13 years, and she has never left. Clearly, she has the continuous three years physical presence. The respondent has never been arrested and there is no evidence to show that she has had any arrests or convictions. Therefore, there is nothing to suggest that she has not been a person of good moral character for the requisite three years, nor is there anything to suggest that she is inadmissible to the United States because of any prohibited ground. Therefore, turning now to the first requirement, that the respondent demonstrate that she has been the victim of abuse, physical abuse or mental abuse, at the hands of her United States citizen husband.

In this instance, the Court finds that the respondent has not provided sufficient evidence to demonstrate that she has been battered by a qualifying United States citizen husband. In the case before the Court, the respondent testified that she and her husband married sometime in 1996, I believe it was. The respondent testified that her husband was fine until after the first seven to eight months of marriage. At that point, she testified that the husband started to demand money from her for cigarettes, that he would shake her in the process of demanding this money, and that he would also use in her words bad words when he spoke to her during these times. Respondent testified that, on perhaps four or five occasions, she had

confrontations with her husband where he asked her or demanded money and shook her and would perhaps push her away from him before leaving the house. Respondent testified that during this time the husband would leave the home and be gone for a period of two to three days.

Asked whether or not the respondent ever suffered physical harm as a result of these altercations, it was the respondent's testimony that she never suffered physical harm where she needed hospital treatment or medication. She went on to say, however, "but he made me suffer a lot of psychological harm. He would call me bad words." The respondent did not put into evidence any police report or other report that would substantiate or corroborate the alleged assaultive incidents. Similarly, the respondent provided no evidentiary evidence [sic] to suggest that she was seen either by a counselor or a psychologist for any type of emotional or psychological trauma that had been caused by her relationship with her United States citizen husband. In fact, there was one bit of medical information submitted by the respondent. This medical information was contained at what has been marked as Exhibit No. 6, but this was a letter from the respondent's medical doctor. The medical doctor provided a statement indicating that the respondent suffers from severe osteoporosis, and that she has been treated by Dr. Martha Severino and the treatment began sometime around May of 2006. According to the doctor's statement, the treatment is required to continue uninterrupted for a period of two years. The doctor's statement provides evidence that the respondent's situation could lead to mortality if not treated, and the statement stated that the respondent was being treated with daily injections of a medication.

In fact, the respondent testified that she sees her physician maybe once every six months, and that she conducts the injections herself.

There was, however, no other medical information submitted on the record, at least not insofar as the Court recalls. There was some type of statement from the respondent's sister that spoke about a particular instance in which the sister did observe what could be described as a slight altercation between the respondent and her husband. It was the testimony of the respondent's sister, Ms. Emma Rosario, that sometime during the summer of 1997 she was present in the respondent's apartment and she sat down and was watching a TV program while the respondent was in the bedroom with her husband. It was Ms. Emma Rosario's testimony that, while she did not hear the conversation, the door to the bedroom was open and she was able to observe the respondent's husband grab the respondent by the shoulders and push her to the bed. The respondent's sister subsequently testified that she spoke to her sister and asked, "what is going on, is there a problem here," to which the respondent replied, "this is not your business, do not get involved, it is okay, it is no problem, it is not a problem," at which point the sister indicated she did that. She did not get further involved. She did not call the police.

This, then, was the only corroborative evidence of any kind of assault or abuse that existed between the respondent and her husband, other than what was testified to by the respondent herself. On cross-examination, counsel for the Government asked respondent's sister why she had not called the police, and he would [sic] on to ask whether the respondent's sister would have called the police had she felt that her

sister's life was in danger, to which the respondent's sister, Ms. Emma Rosario, stated of course she would have called the police if she believed her sister was really in danger. But in this case she did not, and her sister assured her that things were okay and that she should not get involved; it was not a big deal.

On the basis evidence [sic] that has been submitted to demonstrate that the respondent did in fact suffer abuse at the hand of her United States citizen husband, the Court finds that there is insufficient evidence to demonstrate that the respondent in fact suffered abuse. The respondent, by her own testimony, indicated that she was never physically harmed to the point where she required any hospitalization or medication. She never called the police and, as we heard today from the respondent's sister, she directed even her sister not to call the police. The Court asked the respondent during the time of her testimony on October 2 why she had not called the police on her husband. She indicated that she loved her husband. She hoped that her husband would change. She believed that he would change, but she did not want to see him sent to jail and she did not want to harm her husband. Therefore, perhaps the reason why no reports were ever made, but nonetheless, there were no reports made and the family member, her closest family, her sister, who lived in the same building, testified today that she knew very little about the goings and comings in that relationship, that she saw the respondent's husband and she barely spoke to him. That was the extent of it. She said she did not like him. She said further that her sister, the respondent herein, never talked at all about what was going on in the relationship and that the respondent

had always been like that her entire life. She has been very shy and non-communicative.

Therefore, based upon the evidence of record, the Court finds that there is insufficient evidence to demonstrate that the respondent was battered or suffered physical or emotional abuse to the extent contemplated by the Statute in terms of making her eligible for a grant of cancellation under Section 240(b).

Turning now to the respondent's second request for relief; that is for voluntary departure, the Court finds that the respondent is eligible for this form of relief in that: (1) she has been in the United States for more than one year prior to the service of the Notice to Appear; (2) she has been a person of good moral character for at least the past five years; (3) the respondent has the means and has expressed the willingness to purchase her own ticket back to the Dominican Republic; (4) she has indicated her willingness to do so if ordered by the court, although she made it very clear that was not her wish; and (5) the respondent has also testified that she does, in fact, have the means to post a voluntary departure bond in the minimal amount of $500 should that be required. Therefore, the Court finds that the respondent is eligible for a grant of voluntary departure and sees no reason why the Court should not exercise its favorable discretion in affording the respondent this form of relief.

Accordingly, the following orders will be entered in this case.

ORDER

IT IS ORDERED that the respondent is found to be removable pursuant to Section 237(a)(1)(B) of Act as charged.

IT IS FURTHER ORDERED that the respondent [sic] request for cancellation of removal under Section 240A(b) shall be, and the same hereby is, denied.

IT IS FURTHER ORDERED that the respondent's request for voluntary departure shall be, and same hereby is, granted. The Court will grant voluntary departure in this case for the maximum allowable time of 60 days. The respondent will be required to depart the United States not later than June 20, 2008. The Court will impose a minimal departure bond of $500, and will enter an alternative order of removal in the event the respondent does not depart the United States to the Dominican Republic.

/s/
ROBERT P. OWENS
United States Immigration Judge

No. 10-1102

In the Supreme Court of the United States

JOSEFA ROSARIO, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that, under 8 U.S.C. 1252(a)(2)(B)(i), it lacked jurisdiction to review the Board of Immigration Appeals' determination that petitioner failed to demonstrate that she had been battered or subjected to extreme cruelty by a United-States-citizen spouse, a prerequisite to eligibility for discretionary cancellation of removal under 8 U.S.C. 1229b(b)(2).

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In the Supreme Court of the United States

No. 10-1102

JOSEFA ROSARIO, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 27a-39a) is reported at 627 F.3d 58. The opinions of the Board of Immigration Appeals (Pet. App. 40a-45a) and the immigration judge (Pet. App. 46a-55a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 2010. The petition for a writ of certiorari was filed on March 4, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General, in his discretion, may cancel the removal of an alien who is

found to be removable. 8 U.S.C. 1229b (2006 & Supp. III 2009). The discretion of the Attorney General to grant relief from removal is akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (citation omitted). To obtain cancellation of removal, the alien must demonstrate both that she is statutorily eligible for such relief and that she warrants a favorable exercise of discretion. *See, e.g.*, *Guled* v. *Mukasey*, 515 F.3d 872, 879-880 (8th Cir. 2008). The alien bears the burden of proving her eligibility for cancellation of removal. 8 U.S.C. 1229a(c)(4)(A)(i); 8 C.F.R. 1240.8(d).

As part of the Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902, Congress added a new provision to the cancellation-of-removal statute. *See id.* § 40703, 108 Stat. 1955. As relevant here, that provision provides that the "Attorney General may cancel removal" of an alien if she meets five criteria: (1) she "has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen"; (2) the alien has been physically present in the United States for a continuous period of not less than three years immediately preceding the date of her application; (3) she has been a person of "good moral character" during this period; (4) she is not inadmissible under 8 U.S.C. 1182(a)(2) or (3) (criminal or security grounds), is not deportable under 8 U.S.C. 1227(a)(1)(G) (marriage fraud) or 8 U.S.C. 1227(a)(2) through (4) (criminal grounds, document fraud, and security grounds), and has not been convicted of an aggravated felony; and (5) the removal would result in extreme hardship to the alien, her child, or her parent. 8 U.S.C. 1229b(b)(2)(A).

The statute also provides that when considering an application under this provision "[t]he determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General." 8 U.S.C. 1229b(b)(2)(D).

b. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 306, 110 Stat. 3009-607, Congress removed federal courts' jurisdiction to review certain rulings of the Board of Immigration Appeals. As relevant here, Congress provided that "[n]otwithstanding any other provision of law * * *, no court shall have jurisdiction to review any judgment regarding the granting of relief under section * * * 1229b * * * of this title." 8 U.S.C. 1252(a)(2)(B)(i). As previously noted, Section 1229b of Title 8 addresses cancellation of removal.

Nine years later, in the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, Congress amended that jurisdictional limitation to allow judicial review of "constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D).

2. a. Petitioner is a native and citizen of the Dominican Republic. Pet. App. 28a. In 1994, she was admitted to the United States on a one-month tourist visa. *Id.* at 29a. Petitioner did not timely depart in 1994 but instead unlawfully remained in the United States. *Ibid.*

In 1996, petitioner married Pedro Martinez, a U.S. citizen, who petitioned on her behalf to adjust her status to that of a lawful permanent resident. Pet App. 29a. Soon after Martinez filed the petition, he began to become aggressive and insulting toward petitioner. *Ibid.* Between June 1997 and September 1997, there were approximately five instances of "physical abuse or

intimidation." *Ibid.* (There were no allegations of abuse after that period. *Ibid.*)

During those episodes, "Martinez (variously) grabbed [petitioner] by the arms and shoulders, shook her, verbally insulted her, and threw her on the bed." Pet. App. 29a. He demanded that she give him money and threatened that he would withdraw the petition for her adjustment of status if she failed to give him the money he requested. When petitioner "relented to her husband's demands, he would thereafter leave the house and 'disappear' for a few days." *Id.* at 42a. Petitioner "did not report these incidents to the police or seek medical attention." *Id.* at 29a.

The adjustment-of-status application was not pursued, and it was ultimately denied in 2000. Pet. App. 30a. As a result, in 2002, the Department of Homeland Security issued petitioner a Notice to Appear, initiating removal proceedings against her. *Ibid.* She was charged with being removable as an alien who had remained in the United States longer than permitted after admission as a non-immigrant. *Id.* at 46a-47a; see 8 U.S.C. 1227(a)(1)(B).

b. Appearing before an Immigration Judge (IJ), petitioner admitted the allegations contained in the Notice to Appear and conceded that she was removable as charged. Pet. App. 30a. Seeking relief from removal, petitioner filed an application for cancellation of removal under 8 U.S.C. 1229b(b)(2). Pet. App. 30a. The IJ credited petitioner's testimony but found that it was insufficient to meet her burden of showing that she had been battered or subjected to extreme cruelty by her husband. *Id.* at 50a. The IJ noted that petitioner "never suffered physical harm where she needed hospital treatment or medication." *Id.* at 51a. She never called the

police, and she directed her sister not to call either. *Id.* at 53a. Because an alien must meet each of the statutory requirements of Section 1229b(b)(2)(A), the IJ's determination that she had failed to demonstrate that she had been "battered or subjected to extreme cruelty," 8 U.S.C. 1229b(b)(2)(A)(i)(I), rendered petitioner ineligible for cancellation of removal. Pet. App. 54a.

3. The Board of Immigration Appeals (Board or BIA) affirmed. In the Board's view, the IJ properly found that petitioner had failed to meet her burden of demonstrating that she had been battered or subjected to "extreme cruelty." Pet. App. 42a. Like the IJ, the BIA noted that "she did not suffer any physical harm or injury that required any medical attention." *Ibid.*

The Board recognized that its regulation defining an analogous statutory provision stated that "psychological injury" could result from "extreme cruelty." Pet. App. 42a (citing 8 C.F.R. 204.2(c)(1)(vi)). But the Board pointed out that "the examples of harm listed in the regulation[], such as rape, molestation, incest or forced prostitution, are of a more extreme nature than what [petitioner] has alleged in the instant case, that of her husband's use of offensive language and her uncertainty as to what her husband might do when he returned to the house." *Ibid.*

4. The court of appeals dismissed petitioner's petition for review for lack of jurisdiction. Pet. App. 27a-39a. The court noted that 8 U.S.C. 1252(a)(2)(B)(i) had "stripped the federal courts of jurisdiction to review" BIA decisions not to cancel removal, Pet. App. 31a, while the REAL ID Act of 2005 had "prescribed an exception to the general ban on judicial review of BIA decisions for Circuit Court review of 'constitutional claims or

questions of law.'" *Id.* at 32a (quoting 8 U.S.C. 1252(a)(2)(D)).

The court explained that under this system of limited judicial review, courts can review a BIA determination that "explicitly rests on a legal prescription or statutory interpretation." Pet. App. 33a. At the same time, courts may not review a decision in which "the BIA explicitly finds an alien to be eligible for discretionary relief but then refuses to grant relief as an exercise of its discretion." *Ibid.* In between those two poles, the court of appeals said, were "mixed questions of law and fact," which it concluded were reviewable in three situations:

> (1) Where the BIA applies the wrong statute, misinterprets the correct statute, or uses an erroneous legal standard;
>
> (2) Where the BIA's underlying factual determination is "flawed by an error of law"; and
>
> (3) Where the BIA's conclusion is "without rational justification," meaning it is located so far outside the range of reasonable options that it is erroneous as a matter of law.

Id. at 34a.

The court of appeals concluded that the question whether an alien had been "battered or subjected to extreme cruelty" involved application of law to fact. Pet. App. 37a. The statute states a very general legal standard, the court explained, over the determination whether an alien satisfies it "generally entails a factual judgment, not a legal prescription." *Id.* at 36a. The court found important the fact that Congress did not define "battered" or "extreme cruelty" and that the BIA's regulation construing an analogous statutory provision "contemplates the exercise of considerable discretion in

assessing the totality of the circumstances." *Ibid.* (citing 8 C.F.R. 204.2(c)(1)(vi)).

The court concluded that none of the circumstances in which review of application of law to facts is available was present in this case. Pet. App. 38a. First, the BIA applied the "correct law," 8 U.S.C. 1229b(b)(2)(A)(i), and "the correct legal standard," 8 C.F.R. 204.2(c)(1)(vi). Second, "[t]here were no legal errors underlying any of the factual findings the BIA used to reach its decision." Pet. App. 38a. Third, "given the level of abuse [petitioner] claims to have suffered, it cannot be said that the BIA's conclusion was without rational justification." *Ibid.*

The court concluded that "[u]ltimately, the question whether the abuse [petitioner] suffered qualifies her for cancellation of removal is not answered by legal analysis but entails a weighing of facts and circumstances, the sort of value judgment that lies at the core of the [BIA's] exercise of discretion." Pet. App. 38a. Although the BIA's decision "can be described as an application of law to fact, * * * that characterization cannot convert a factual determination into a legal question" reviewable in the court of appeals. *Id.* at 38a-39a.

ARGUMENT

Petitioner contends (Pet. 7-23) that the court of appeals erred in holding that it lacked jurisdiction to review the Board's determination that she failed to show that she had been "battered or subjected to extreme cruelty." 8 U.S.C. 1229b(b)(2)(A)(i)(I). The court of appeals correctly concluded that petitioner was not asserting a "constitutional claim[] or question[] of law," 8 U.S.C. 1252(a)(2)(D), and that it therefore lacked jurisdiction to review the denial of cancellation of removal.

Although the Ninth Circuit had previously found a claim like petitioner's reviewable, that decision came before statutory amendments altered the scheme of judicial review over such claims. Further review is not warranted.

1. The court of appeals correctly concluded that 8 U.S.C. 1252(a)(2)(B)(i) deprived it of jurisdiction to review the Board's ruling denying petitioner's application for special-rule cancellation of removal. That provision precludes review of "any judgment" regarding the granting of relief under the cancellation of removal provisions in 8 U.S.C. 1229b (2006 & Supp. III 2009). 8 U.S.C. 1252(a)(2)(B)(i). There is a narrow exception to that jurisdictional bar for "constitutional claims or questions of law," 8 U.S.C. 1252(a)(2)(D), but the court of appeals correctly found that exception inapplicable in this case.

Whether an alien has been subjected to "extreme cruelty" by a spouse rendering her eligible for special-rule cancellation under Section 1229b(b)(2)(A)(i) is not a question of law but rather a fact-intensive, discretionary determination. "Determining whether a given course of conduct is 'extremely cruel' involves more than simply plugging facts into a formula." *Perales-Cumpean* v. *Gonzales*, 429 F.3d 977, 982 (10th Cir. 2005); see *id.* at 983 ("There is no hard-and-fast rule to distinguish 'extreme cruelty' from other, less severe, forms of cruel behavior."); *Wilmore* v. *Gonzales*, 455 F.3d 524, 527 (5th Cir. 2006) ("[W]e find that the term 'extreme cruelty' is not self-explanatory."). Instead, "[t]he agency is required to make a judgment whether the cruel conduct alleged is sufficiently extreme to implicate the purposes of the statute." *Perales-Cumpean*, 429 F.3d at 982; see *Stepanovic* v. *Filip*, 554 F.3d 673, 680 (7th Cir. 2009)

("[T]he IJ must determine the facts of a particular case, make a judgment call as to whether those facts constitute cruelty, and, if so, whether the cruelty rises to such a level that it can rightly be described as extreme.").

The BIA has found that a regulation construing an analogous statutory provision illuminates the meaning of battery and extreme cruelty in this context, see Pet. App. 41a-42a, and that regulation is also open-ended and calls for the exercise of fact-intensive discretion. 8 C.F.R. 204.2(c)(1)(vi) ("[T]he phrase 'was battered by or was the subject of extreme cruelty' includes, but is not limited to" specified examples, and "[o]ther abusive actions may also be acts of violence under certain circumstances."); see *Perales-Cumpean*, 429 F.3d at 984 ("[T]his regulation does not provide a binding, objective standard that would channel the BIA's discretion in a manner making it subject to judicial review."); Pet. App. 36a.

The court of appeals' conclusion that it lacked jurisdiction over petitioner's claim is buttressed by a provision specific to the portion of the statute providing eligibility for cancellation of removal for aliens who have been subjected to battery or extreme cruelty. That provision provides that "[t]he determination of what evidence is credible and the weight to be given that evidence shall be within the *sole discretion* of the Attorney General." 8 U.S.C. 1229b(b)(2)(D) (emphasis added). In this case, the IJ determined what "weight" to give petitioner's evidence of abuse and concluded that it was insufficient to meet her burden under the statute. As the statute recognizes, that was a determination within his "sole discretion," *ibid.*, and was not a legal determination.

2 The court of appeals' decision is consistent with decisions from the Third, Fifth, Seventh, and Tenth Circuits, all of which have concluded that BIA determinations that particular conduct did not constitute battery or extreme cruelty were not judicially reviewable. See *Johnson* v. *Attorney Gen.*, 602 F.3d 508, 511 (3d Cir. 2010); *Wilmore*, 455 F.3d at 527; *Stepanovic*, 554 F.3d at 679; *Perales-Cumpean*, 429 F.3d at 982; see also *Ramdane* v. *Mukasey*, 296 Fed. Appx. 440, 441-442, 448 (6th Cir. 2008).

In a pre-REAL ID Act of 2005 case, the Ninth Circuit held that the BIA's determination that an alien had not suffered "extreme cruelty" was judicially reviewable, see *Hernandez* v. *Ashcroft*, 345 F.3d 824, 833-835 (2003), but that decision does not directly conflict with the court of appeals' jurisdictional holding here because the judicial review provisions have changed since *Hernandez*. Judicial review in *Hernandez* was governed by the INA's no-longer-operative "transitional rules," which provided that "there shall be no appeal of any *discretionary* decision under section * * * 244 * * * of the Immigration and Nationality Act," *i e* , the provision allowing for suspension of deportation. IIRIRA, § 309(c)(4)(E), 110 Stat. 3009-626, 8 U.S.C. 1101, Note (emphasis added); see *Hernandez*, 345 F.3d at 833.

Given that it was applying that statute, the Ninth Circuit viewed the question of its jurisdiction as turning entirely on "whether the inquiry into whether a [Violence Against Women Act] petitioner suffered 'extreme cruelty' is discretionary or nondiscretionary." *Hernandez*, 345 F.3d at 833. The court concluded that the determination was nondiscretionary (but factual). See *id.* at 834 ("The existence or nonexistence of battery is clearly a factual determination, readily resolved by the

application of a legal standard defining battery to the facts in question."); *ibid.* ("[E]xtreme cruelty involves a question of fact, determined through the application of legal standards.").

As noted previously, the judicial review provisions in the INA have now changed, and they no longer draw a textual line between discretionary and non-discretionary decisions. Instead, the INA currently deprives courts of jurisdiction over "any judgment regarding the granting of" cancellation of removal, 8 U.S.C. 1252(a)(2)(B)(i), while creating an exception only for "constitutional claims or questions of law," 8 U.S.C. 1252(a)(2)(D).

Recognizing this change, the court of appeals in this case noted that jurisdiction in this context had been articulated in "two ways." Pet. App. 32a. The court of appeals first noted that, based on this Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), the Second Circuit had previously said (like the Ninth Circuit in *Hernandez*) that it "could review those 'nondiscretionary decisions' by the BIA that underlie its exercise of discretion in granting or denying cancellation of removal." Pet. App. 32a (quoting *Rodriguez* v. *Gonzales*, 451 F.3d 60, 62 (2d Cir. 2006)). Yet "[l]ater, based on the REAL ID Act," the court of appeals noted that it had said its review was limited to "'constitutional claims or questions of law' raised by the BIA's exercise of its discretion." *Id.* at 32a-33a (quoting *Argueta* v. *Holder*, 617 F.3d 109, 112 (2d Cir. 2010) (per curiam)).

For purposes of this case, the court of appeals viewed these two standards as "congruent," Pet. App. 33a, and it would have found no jurisdiction under either one, compare *id.* at 36a (question "entails a factual judgment, not a legal prescription") with *id.* at 38a (BIA decision

involved "the sort of value judgment that lies at the core of the BIA's exercise of discretion").

The Ninth Circuit, however, has not revisited its jurisdictional holding in *Hernandez* in light of the changes to the judicial review provisions of the INA or said that it would view the jurisdictional inquiry under both approaches as the same in this context.[1] In particular, the Ninth Circuit has not addressed the question whether the BIA's determination that an alien failed to establish that she was subjected to "battery" or "extreme cruelty"—determinations the court in *Hernandez* deemed "question[s] of fact" (345 F.3d at 834)—are reviewable under a statutory scheme that permits judicial review only of "constitutional claims or questions of law," 8 U.S.C. 1252(a)(2)(D).

At least unless and until the Ninth Circuit expressly revisits its jurisdictional holding in *Hernandez* in light of the subsequent changes to the judicial review statutes, any conflict between it and the other courts of appeals is not ripe for resolution by this Court.[2]

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[1] In *Lopez Birrueta* v. *Holder*, 633 F.3d 1211 (2011), the Ninth Circuit reviewed a BIA determination that an alien's children had not been "battered" or "subjected to 'extreme cruelty.'" *Id.* at 1213-1214. The court, however, did not address its jurisdiction and, in any event, granted the petition for review based on "several errors in [the BIA's] *legal* analysis." *Id.* at 1216 (emphasis added).

[2] The court of appeals in *Hernandez* also did not consider former 8 U.S.C. 1254(g) (1994), which, like current Section 1229b(b)(2)(D), committed the determination of the weight and credibility of the evidence regarding the determination of extreme cruelty or battering "to the sole discretion of the Attorney General." Any conflict between the Ninth Circuit and the other courts of appeals would likewise not be ripe until the Ninth Circuit addressed that provision in the context of concluding that it had jurisdiction.

3. Finally, this case would make a poor vehicle for consideration of the jurisdictional question presented because petitioner would not have prevailed on the merits even if the court of appeals had concluded that it could review her claim.

The BIA correctly concluded that the five incidents petitioner alleged in 1997 did not amount to "battery" or "extreme cruelty." Pet. App. 42a. Although petitioner's husband "shook her, pushed her and used bad words in the process of demanding money from her," she "did not suffer any physical harm or injury that required any medical attention," and she failed to establish any significant "psychological impact" from her husband's conduct. *Id.* at 42a-43a. Moreover, after petitioner's husband was released from jail in 2000 (for offenses unrelated to petitioner), he did not repeat this conduct or engage in any other alleged abuse. *Id.* at 29a. Especially given that questions of the "weight" of evidence of are in the "sole discretion" of the BIA, 8 U.S.C. 1229b(b)(2)(D), petitioner would be unable to show that the BIA erred in concluding that she was not subjected to "*extreme* cruelty," 8 U.S.C. 1229b(b)(2)(A)(i)(I).[3]

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[3] Even if petitioner were successful in establishing that she was subjected to "extreme cruelty," she would also have to establish that she satisfied the "extreme hardship" requirement for special-rule cancellation of removal, a question the BIA found it unnecessary to reach. Pet. App. 43a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2011